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No. 15-6418

IN THE
Supreme Court of the United States

GREGORY WELCH,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Whether the District Court was in error when it denied relief on Petitioner's § 2255 motion to vacate, which alleged that a prior Florida conviction for "sudden snatching" did not qualify for ACCA enhancement pursuant to 18 U.S.C. § 924(e).

II. Whether *Johnson v. United States*, 135 S. Ct. 2551 (2015), announced a new substantive rule of constitutional law that applies retroactively to cases that are on collateral review.

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INTRODUCTION

In *Johnson v. United States*, 135 S. Ct. 2551 (2015), this Court invalidated the residual clause of the Armed Career Criminal Act ("ACCA"), holding that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life" violates the Fifth Amendment's prohibition on vague criminal laws. *Id.* at 2560. The issue in this case is whether that rule applies retroactively to defendants whose convictions became final before *Johnson*.

Plainly, it does. In *Teague v. Lane*, 489 U.S. 288 (1989), this Court "continued a long tradition of giving retroactive effect to constitutional rights that go beyond procedural guarantees." *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758, at *9 (U.S. Jan. 25, 2016). *Johnson* falls squarely within this category of constitutional rules that are substantive, not procedural, in nature and thus applies retroactively. *Johnson* held that the residual clause—under which a defendant's sentence was increased from a *maximum* of 10 years' imprisonment to a *minimum* of 15 years' imprisonment—is constitutionally invalid. In myriad cases, and most recently in *Montgomery*, this Court has recognized that when a law is held unconstitutional, it is "'void, and is as no law,'" and any penalty imposed pursuant to that law "is, by definition, unlawful." *Montgomery*, 2016 WL 280758, at *10 (quoting *Ex parte Siebold*, 100 U.S. 371 (1880)). *Johnson*'s constitutional holding is thus the clearest instance of a substantive rule: A determination that courts imposed punishment in excess of their lawful authority.

That conclusion accords not only with this Court's cases applying *Teague*, but also with the history of this Court's cases concerning the availability of the writ of habeas corpus. Indeed, this Court has recognized that habeas corpus relief is available to a petitioner whose punishment was imposed under an unconstitutional statute for at least 135 years. *See, e.g., Ex parte Siebold*, 100 U.S. 371 (1880). To deny relief in these circumstances now would undermine the very core of habeas corpus, which exists for the purpose of challenging ongoing confinement that has been imposed without legal authority.

Although *Teague* held that rules of procedure generally will not be applied retroactively, the rule announced in *Johnson*—that the residual clause is unconstitutionally vague and therefore cannot under any circumstances support an increase in a defendant's sentence—obviously is not procedural in nature, *i.e.*, a rule that "regulate[s] only the *manner of determining* the defendant's culpability." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (emphasis in original). Neither "the use of impeccable factfinding procedures" nor "the use of flawless sentencing procedures" could legitimate an increased sentence under the residual clause. *Montgomery*, 2016 WL 280758, at *8 (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 724 (1971)). Under *Johnson*, a court lacks lawful authority to increase a sentence under the residual clause no matter what procedures it employs.

Because *Johnson* must be applied retroactively and Petitioner's sentence was increased under the unconstitutionally vague residual clause, the Eleventh

Circuit's judgment denying Petitioner a certificate of appealability should be reversed.

OPINIONS BELOW

The Eleventh Circuit's order below (JA 14a) is unreported. The district court's order adopting the Magistrate's Report and Recommendation (JA 25a) is unreported. The Magistrate Judge's Report and Recommendation (JA 28a) is unreported. The Eleventh Circuit's decision on direct appeal (JA 101a) is reported at 683 F.3d 1304. The trial court's judgment (JA 130a) is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit entered its judgment on June 9, 2015. The petition for writ of certiorari was timely filed on September 2, 2015, and granted on January 8, 2016.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."

28 U.S.C. § 2255(a) provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the

> sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

18 U.S.C. § 924(a)(2) provides: "Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both."

18 U.S.C. § 924(e) provides, in pertinent part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years
>
> (2) As used in this subsection—
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, that–
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

STATEMENT

I. Petitioner's Conviction And Sentencing.

On June 18, 2010, Petitioner pled guilty to possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). JA 31a, 104a. The terms of Petitioner's original plea agreement specified that he could be sentenced up to the statutory maximum of 10 years' imprisonment that applies to violations of § 922(g)(1). JA 31a; 18 U.S.C. § 924(a)(2). The agreement did not provide for enhancement pursuant to ACCA, which would have subjected Petitioner to a mandatory minimum sentence of 15 years' imprisonment. 18 U.S.C. § 924(e).

At Petitioner's plea colloquy, the court explained to Petitioner, based on his unenhanced plea to possession of a firearm: "I can't sentence you to more than 10 years," because that would be "more than the law permits" and constitute "an illegal sentence." Transcript of Plea Colloquy 19, *United States v. Welch*, No. 09-cr-60212 (S.D. Fla. June 18, 2010), ECF No. 54.

Thereafter, Petitioner's presentence investigation report ("PSI") asserted that Petitioner had three prior convictions, each of which purportedly qualified as a "violent felony" under ACCA: a 2003 conviction for felony battery under Florida law and two 1996 convictions for robbery under Florida law. PSI at 7 (dated Aug. 6, 2010). Based on these prior convictions, the PSI concluded that Petitioner was subject to a mandatory minimum of 15 years' imprisonment. PSI at 20; 18 U.S.C. § 924(e). On advice of counsel, Petitioner accepted a new plea agreement that reflected a

mandatory minimum sentence of 15 years' imprisonment. JA 34a-35a, 121a. However, he reserved the right to challenge his qualification under ACCA. JA 104a, 142a.

At sentencing Petitioner argued that neither Florida battery nor Florida robbery qualified as a "violent felony" under ACCA. JA 145a-149a, 184a-186a.[1] The court rejected Petitioner's arguments and sentenced Petitioner to ACCA's mandatory minimum of 15 years' imprisonment. JA 152a-158a, 160a-161a.

II. Direct Appeal.

On appeal, Petitioner again challenged whether Florida robbery qualified as a "violent felony" under ACCA.

The Eleventh Circuit agreed that ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i), "arguably would not apply" to Florida robbery because Petitioner was

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[1] Petitioner argued that neither offense could qualify as a "violent felony" under ACCA's elements clause, 18 U.S.C. § 924(e)(2)(B)(i), based on this Court's decision in *Johnson (Curtis) v. United States*, 559 U.S. 133 (2010), which held that the elements clause requires "*violent* force," defined as "'extreme physical force'" that is "capable of causing physical pain or injury to another person." *Id.* at 140 (quoting *Black's Law Dictionary* 1188 (9th ed. 2009)); JA 148a, 184a-185a. With respect to Florida robbery, Petitioner argued—and the government conceded—that at the time of Petitioner's conviction, Florida law provided that "[t]he degree of force used [was] immaterial" to conviction for robbery. *Montsdoca v. State*, 93 So. 157, 159 (Fla. 1922); *see* JA 148a-149a, 184a-185a; *see also* JA 152a (government conceding that Florida robbery "doesn't have a requirement" as to "the degree of force involved").

convicted "at a time when the controlling Florida Supreme Court authority held that 'any degree of force' would convert larceny into a robbery," JA 114a-115a, 117a (quoting *McCloud v. State*, 335 So. 2d 257, 258-59 (Fla. 1976)). The court stated that it "need not" definitively hold that Florida robbery did not qualify under the elements clause, however, because the offense "suffices under the residual clause." JA 117a.

Specifically, according to the court, Florida robbery "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), because regardless of the amount of force used, robbery "ordinarily involves substantial risk of physical injury to the victim." JA 119a. The court posited that "[t]he victim's natural reaction is likely to be to try to hold on to his or her money or property, leading in many cases to serious injury." *Id.* As an example, the court described a case in which an "old woman died from the fall she took when the robber grabbed her purse in a parking lot." *Id.* Thus, the Eleventh Circuit reasoned, Florida robbery was "much like burglary, where if the victim perceives what is going on, a violent encounter is reasonably likely to ensue." *Id.* Accordingly, the court affirmed Petitioner's sentence under the residual clause. *Id.*

III. Petitioner's *Pro Se* Motion Under 28 U.S.C. § 2255.

On December 20, 2013, Petitioner filed a *pro se* motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, alleging, among other things, that he was "unconstitutionally sentenced as an armed career offender" and that his sentence "was enhanced

unconstitutionally to armed career offender status, in violation of his Fifth, Sixth, and Eighth Amendment rights." JA 83. Petitioner further alleged that ACCA's application to his robbery conviction "is ambiguous, vague, and was without any violence and[/]or physical force," and that therefore his sentence was "enhanced for a robbery that did not meet armed career offender requirements." JA 96a.

The district court denied Petitioner's § 2255 motion on December 19, 2014 and declined to issue a certificate of appealability. JA 25a-26a.

On January 30, 2015, Petitioner filed a *pro se* request for a certificate of appealability in the Eleventh Circuit. JA 17a-22a. In his request, Petitioner explained that *Johnson*—which had recently been calendared for reargument on the question of "[w]hether the residual clause in the Armed Career Criminal Act of 1984, 18 U. S. C. § 924(e)(2)(B)(ii), is unconstitutionally vague," *see* Docket Entry, *Johnson v. United States*, No. 13-7120 (U.S. Jan. 9, 2015)—was pending before this Court, *see* JA 20a. Petitioner also filed a motion to hold his case in abeyance pending this Court's resolution of *Johnson* and requested that the Eleventh Circuit grant relief from his sentence under ACCA in the event that *Johnson* was resolved favorably to him. *See* JA 15a-16a.

The Eleventh Circuit denied Petitioner's request for a certificate of appealability prior to this Court's decision in *Johnson*, without addressing Petitioner's motion. JA 14a.

IV. This Court's Decision In *Johnson*.

In *Johnson*, this Court invalidated ACCA's residual clause, holding that it violates the Fifth Amendment's prohibition on vague criminal laws. 135 S. Ct. at 2560.

The Court explained that "[t]wo features of the residual clause conspire to make it unconstitutionally vague." *Id.* at 2557. First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime." *Id.* In particular, the clause "ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements," yet offers no guidance as to how "one go[es] about deciding what kind of conduct the 'ordinary case' of a crime involves." *Id.* Using attempted burglary as an example, the Court explained that the residual clause "offers no reliable way" to determine whether the "ordinary" attempted burglary is likely to result in a "chase, and a violent encounter," or "the occupant's yelling 'Who's there?' from his window, and the burglar's running away." *Id.* at 2558 (internal quotation marks omitted).

Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* The Court observed that the amount of risk required must be interpreted "in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives"—which are themselves "'far from clear in respect to the degree of risk each poses.'" *Id.* (quoting *Begay v. United States*, 553 U.S. 137, 143 (2008)); *see also id.* ("Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the

typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information?").

After reviewing its own decisions interpreting the residual clause and decisions in the lower courts, the Court observed that "the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause." *Id.* at 2562. On these bases, the Court held "that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Id.* at 2563.

V Post-*Johnson* Developments And Petition To This Court.

After this Court's decision in *Johnson*, Petitioner filed a *pro se* motion for leave to seek reconsideration of the denial of his § 2255 motion in the Eleventh Circuit, which the court denied as untimely. *See* JA 12a-13a.[2]

Following *Johnson*, a prevailing (and arguably unanimous) view developed among the circuits that *Johnson* announced a substantive rule of criminal law that applies retroactively to prisoners (like Petitioner)

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[2] Petitioner separately moved for the Eleventh Circuit to recall its mandate in his direct appeal on the ground that the residual clause, upon which it had relied, was held unconstitutional in *Johnson*. *See* Motion to Recall Mandate, *United States v. Welch*, No. 10-14649 (11th Cir. Sept. 2, 2015). The Eleventh Circuit denied that motion on December 1, 2015. Order, *United States v. Welch*, No. 10-14649 (11th Cir. Dec. 1, 2015).

who are pursuing their first motion under 28 U.S.C. § 2255.[3] Indeed, following its denial of Petitioner's request for a certificate of appealability, the Eleventh Circuit has recognized that *Johnson* announced a "new substantive rule" that applies retroactively to cases like Petitioner's, which arise in the context of a first § 2255 motion. *In re Rivero*, 797 F.3d 986, 991 (11th Cir. 2015).

The circuits sharply split, however, as to whether *Johnson* has been "made retroactive" by this Court, such that it would apply in the case of a second or successive motion under § 2255. *See* 28 U.S.C. § 2255(h)(2).[4] As a result, prisoners on one side of the

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[3] *See In re Watkins*, No. 15-5038, __ F.3d __, 2015 WL 9241176, at *6 (6th Cir. Dec. 17, 2015) ("*Johnson* announced a substantive rule that prohibits the imposition of ACCA's 15-year mandatory minimum sentencing provision on defendants whose status as armed career criminals depends on application of the unconstitutionally vague residual clause"); *Price v. United States*, 795 F.3d 731, 732 (7th Cir. 2015) ("We now conclude . . . that *Johnson* announces a new substantive rule of constitutional law that the Supreme Court has categorically made retroactive to final convictions."); *In re Rivero*, 797 F.3d 986, 991 (11th Cir. 2015) (where a petitioner is "seeking a first collateral review of his sentence, the new substantive rule from *Johnson* would apply retroactively"). In *In re Williams*, 806 F.3d 322 (5th Cir. 2015), the Fifth Circuit's reasoning suggested that *Johnson* might not be retroactive to cases on collateral review; however, as described further below, that decision took place in the context of a successive § 2255 motion and it is not clear that the Fifth Circuit would depart from its sister circuits' unanimous view that *Johnson* is retroactive to an initial motion. *See infra* 22-24 & n.8.

[4] The First, Second, Sixth, Seventh, Eighth, and Ninth Circuits have all authorized petitioners to file successive § 2255 motions

split are already being resentenced or released under *Johnson*, while those on the other are being required to carry out their unconstitutionally-imposed sentences.

These prisoners face an impending statute of limitations to file their claims for relief, which expires on June 26, 2016 (one year from the date of this Court's decision in *Johnson*). *See* 28 U.S.C. § 2255(f)(3) (statute of limitations runs from "the date on which the right asserted was initially recognized by the Supreme Court"); *Dodd v. United States*, 545 U.S. 353, 357 (2005).

Following the Eleventh Circuit's denial of leave to seek reconsideration, Petitioner filed a *pro se* petition for certiorari in this Court, which was granted on January 8, 2016. This Court's resolution of Petitioner's case will necessarily resolve the split affecting second or successive motions. *See Tyler v. Cain*, 533 U.S. 656, 668 (2001) (O'Connor, J., concurring) ("The clearest instance, of course, in which we can be said to have 'made' a new rule retroactive is where we expressly have held the new rule to be retroactive in a case on collateral review and applied the rule to that case.").

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based on *Johnson*. *See Pakala v. United States*, 804 F.3d 139 (1st Cir. 2015); Order, *Rivera v. United States*, No. 13-4654 (2d Cir. Oct. 5, 2015), ECF No. 44; *Watkins*, 2015 WL 9241176, at *6-7 (6th Cir.); *Price*, 795 F.3d at 734-35 (7th Cir.); *Woods v. United States*, 805 F.3d 1152, 1154 (8th Cir. 2015); Order, *United States v. Striet*, No. 15-72506 (9th Cir. Aug. 25, 2015), ECF No. 2. The Fifth, Tenth, and Eleventh Circuits have denied such authorization. *See Williams*, 806 F.3d at 327 (5th Cir.); *In re Gieswein*, 802 F.3d 1143, 1148-49 (10th Cir. 2015); *Rivero*, 797 F.3d at 992 (11th Cir.).

SUMMARY OF ARGUMENT

The rule announced in *Johnson*—that a defendant cannot constitutionally be sentenced to 15 years to life under the residual clause because it is unconstitutionally vague—is a substantive rule that applies retroactively on collateral review.

Under *Teague v. Lane*, 489 U.S. 288 (1989), and subsequent decisions, "courts must give retroactive effect to new substantive rules of constitutional law," while new rules of criminal procedure are generally not applied retroactively. *Montgomery v. Louisiana*, No. 14-280, 2016 WL 280758, at *5 (U.S. Jan. 25, 2016); *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). The rule announced in *Johnson* is plainly substantive, not procedural, because it directly alters the class of persons subject to punishment under ACCA. *Schriro*, 542 U.S. at 353. *Johnson* held that the Constitution does not permit a court to sentence a defendant to 15 years to life on the basis that he engaged in "conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). As this Court has long recognized, "'[a]n unconstitutional law is void, and is as no law,'" and it follows that "[a] penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." *Montgomery*, 2016 WL 280758, at *10 (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)).

Johnson thus possesses the paradigmatic feature of substantive rules: A defendant whose sentence was increased under the residual clause "faces a punishment that the law cannot impose upon him." *Schriro*, 542

U.S. at 352. Application of the residual clause increased a defendant's sentence from a *maximum* of 10 years' imprisonment to a *minimum* of 15 years' imprisonment. Thus, every defendant whose qualification under ACCA depended on the residual clause faces *at least* five additional years of confinement that were not authorized by law. To deny retroactivity in these circumstances "would be inconsistent with the doctrinal underpinnings of habeas review." *Bousley v. United States*, 523 U.S. 614, 621 (1998).

The rule of *Johnson*—that the residual clause is void for vagueness and therefore cannot, under any circumstances, support an increase in a defendant's maximum sentence—cannot fairly be considered procedural in nature, *i.e.*, as "regulat[ing] only the *manner of determining* the defendant's culpability." *Schriro*, 542 U.S. at 353 (emphasis in original). Under *Johnson*, a court may not increase a sentence under the residual clause no matter what procedures it employs.

That *Johnson* must be applied retroactively is also confirmed by the origins of *Teague*'s distinction between substantive and procedural rules, and by the history of the writ of habeas corpus. As this Court has explained, "[t]he category of substantive rules discussed in *Teague* originated in Justice Harlan's approach to retroactivity" in *Mackey v. United States*, 401 U.S. 667 (1971), and *Desist v. United States*, 394 U.S. 244 (1969). *Montgomery*, 2016 WL 280758, at *8. Under that approach, Petitioner's *Johnson* claim—in which he "attack[s] the constitutionality of the federal or state statute" that was believed to authorize his

now-final conviction and punishment—is the paradigmatic example of a claim for which "the writ has historically been available." *Mackey*, 401 U.S. at 684, 692-93 (Harlan, J., concurring in part and dissenting in part) (citations omitted); *see Desist*, 394 U.S. at 261 & n.2 (Harlan, J., dissenting).

As Petitioner explained in his petition for certiorari to this Court—and the government did not contest in its certiorari briefing—Petitioner qualified under ACCA only by virtue of the residual clause. Because *Johnson* is retroactive, the district court's judgment is in error and the Eleventh Circuit should be reversed.

ARGUMENT

I. *Johnson* Is Retroactive To Cases On Collateral Review.

A. Under *Teague*, Substantive Rules Must Be Applied Retroactively.

Under this Court's framework for retroactivity, set forth in *Teague* and subsequent cases, the retroactivity of a given rule depends on whether it is substantive or procedural in nature. *Schriro*, 542 U.S. at 351-53. "*Teague* continued a long tradition of giving retroactive effect to constitutional rights that go beyond procedural guarantees. *Montgomery*, 2016 WL 280758, at *9. Therefore, under *Teague*, "courts must give retroactive effect to new substantive rules of constitutional law." *Id.* at *5; *see also id.* at *6 ("*Teague* requires the retroactive application of new substantive rules in federal habeas proceedings."). Procedural rules, on the other hand, "generally do not

apply retroactively." *Schriro*, 542 U.S. at 352; *Montgomery*, 2016 WL 280758, at *5.[5]

The rationale for *Teague*'s exception to retroactivity in the case of procedural rules is straightforward. "[A] procedural rule 'regulate[s] only the *manner of determining* the defendant's culpability.'" *Montgomery*, 2016 WL 280758, at *11 (quoting *Schriro*, 542 U.S. at 353) (emphasis in original). Examples of such rules include those governing the admissibility of evidence, *see, e.g.*, *Whorton v. Bockting*, 549 U.S. 406 (2007); the makeup of a jury, *see, e.g.*, *Teague*, 489 U.S. 288; permissible jury instructions, *see, e.g.*, *Beard v. Banks*, 542 U.S. 406, 408 (2004); *Saffle v. Parks*, 494 U.S. 484 (1990); and what representations may be made to a jury, *see, e.g.*, *O'Dell v. Netherland*, 521 U.S. 151, 153 (1997); *Sawyer v. Smith*, 497 U.S. 227, 229 (1990). "Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful." *Montgomery*, 2016 WL 280758, at *8. Therefore, the recognition of a new procedural rule "merely raise[s] the possibility that someone convicted with use of [an] invalidated procedure might have been acquitted otherwise" or "faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352. As a result of "this

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[5] Although *Teague* itself framed the retroactivity of substantive rules as an exception, this Court has since explained numerous times that *Teague*'s bar is the exception and that substantive rules are simply "not subject to" *Teague*. *Montgomery*, 2016 WL 280758, at *5 (quoting *Schriro*, 542 U.S. at 352 n.4); *Beard v. Banks*, 542 U.S. 406, 411 n.3 (2004).

more speculative connection to innocence," the retroactive application of procedural rules is generally outweighed by the interests of comity (in the case of state convictions) and finality. *Id.*; *see Teague*, 489 U.S. at 308.

The same cannot be said about rules "that go beyond procedural guarantees" and instead affect substantive criminal law. *Montgomery*, 2016 WL 280758, at *9. A substantive rule "alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353; *Montgomery*, 2016 WL 280758, at *11. "Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Montgomery*, 2016 WL 280758, at *5 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989)). They also include "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct," *Bousley*, 523 U.S. at 620-21, by, for instance, "narrow[ing] the scope of a criminal statute by interpreting its terms," *Schriro*, 542 U.S. at 351-52.

"Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 352 (quotation marks omitted); *Montgomery*, 2016 WL 280758, at *13. Indeed, when a decision of this Court holds that the statute which was thought to authorize a defendant's conviction or sentence is, in fact, unconstitutional (or

otherwise does not authorize the defendant's punishment), it creates not just a "significant risk" but a *certainty* that the defendant faces conviction or punishment that the law cannot impose upon him. For these reasons, substantive rules are "not subject to" the exception to retroactivity drawn in *Teague*. *Montgomery*, 2016 WL 280758, at *5 (quoting *Schriro*, 542 U.S. at 352 n.4).[6]

This Court confirmed these principles in *Bousley v. United States*, where it held that a decision narrowly interpreting the offense defined in 18 U.S.C. § 924(c)(1) was substantive and thus not subject to *Teague*'s bar. 523 U.S. at 616. Bousley claimed that his final conviction was "constitutionally invalid" because he did not knowingly and voluntarily plead guilty to actively employing a firearm—an element of § 924(c)(1) that this Court first recognized in *Bailey v. United States*, 516 U.S. 137 (1995), after Bousley's conviction had become final. *Bousley*, 523 U.S. at 616-17, 618-19. This Court expressly rejected the argument that *Teague* barred retroactive application of *Bailey* to Bousley's final conviction: "Because *Teague* by its terms applies only to procedural rules," the Court observed, "it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by

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[6] *Teague*'s recognition that certain "watershed" procedural rules may also be applied retroactively reflects the same logic: If the court's failure to observe a "bedrock" procedural rule "seriously diminish[es] the likelihood" that it obtained an accurate result, the probability of a substantive injustice is sufficient to outweigh the finality interest. *Teague*, 489 U.S. at 315; *see Bousley*, 523 U.S. at 620.

Congress." *Id.* at 620. As the Court explained, "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct beyond the power of the criminal law-making authority to proscribe, necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal." *Id.* (quoting *Teague*, 489 U.S. at 313; *Davis v. United States*, 417 U.S. 333, 346 (1974)) (quotation marks omitted). Because "under our federal system it is only Congress, and not the courts, which can make conduct criminal," denying retroactive application where a criminal statute has been held not to reach a defendant's conduct "would be inconsistent with the doctrinal underpinnings of habeas review." *Id.* at 620-21.

B. *Johnson* Is Substantive, Not Procedural.

Johnson held that the residual clause is void for vagueness and thus unconstitutional in all of its applications. 135 S. Ct. at 2557, 2660. It thereby determined that a defendant cannot constitutionally be sentenced to 15 years to life under the residual clause and instead faces a statutory maximum of 10 years' imprisonment. *Id.*

1. This rule is plainly substantive. By holding that the government cannot constitutionally impose punishment on the basis that a defendant committed "conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B), *Johnson* directly altered "the class of persons that the law punishes." *Schriro*, 542 U.S. at 353. It is a basic principle that "[a]n unconstitutional law is void, and is

as no law." *Montgomery*, 2016 WL 280758, at *10 (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)). "It follows that when a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *Id.* at *8. *Johnson* is therefore substantive for the same reason as *Bailey*: It holds that the statute believed to authorize the defendant's punishment, in fact, did not authorize that punishment, and thus it "'necessarily carr[ies] a significant risk that a defendant' faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352-53 (quoting *Bousley*, 523 U.S. at 620).

Because the government could not constitutionally impose 15 years to life under the residual clause, denying retroactive application of *Johnson* would, as in *Bousley*, "be inconsistent with the doctrinal underpinnings of habeas review." *Bousley*, 523 U.S. at 620-21. Consistent with these principles, this Court has on multiple occasions recognized claims for habeas relief on the basis that the statute of conviction was unconstitutionally vague, *see Smith v. Goguen*, 415 U.S. 566, 567-72 (1974) (holding that the statute under which the petitioner was convicted was unconstitutionally vague and applying that rule retroactively to grant habeas relief); *In re Gregory*, 219 U.S. 210, 214 (1911) (holding that the petitioner's claim for relief from his final conviction on the basis that his statute of conviction was "so uncertain as to make the prohibition nugatory" was cognizable on habeas corpus), and "*Teague* continued [the] long tradition" of such retroactive application. *Montgomery*, 2016 WL 280758,

at *9. As the Court has already recognized, "[a] penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." *Id.* at *10.

Furthermore, *Johnson* is obviously not procedural in nature, such that it would be subject to *Teague*'s bar. The rule *Johnson* announced—that the residual clause is unconstitutionally vague and cannot, in any circumstances, support an increased sentence—plainly does not "regulate only the *manner of determining* [a] defendant's culpability." *Schriro*, 542 U.S. at 353 (emphasis in original). Neither "the use of impeccable factfinding procedures" nor "the use of flawless sentencing procedures" could legitimate an increased sentence under the residual clause, *Montgomery*, 2016 WL 280758, at *8 (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 724 (1971))—it is unconstitutional for a court to increase a defendant's sentence under the residual clause regardless of the procedures it uses in the process. As such, *Johnson* cannot be said to "merely raise the possibility" that a defendant whose sentence was increased under the residual clause "faces a punishment that the law cannot impose upon him." *Schriro*, 542 U.S. at 352. In all cases, a defendant whose qualification under ACCA depended on the residual clause has been subjected to punishment that the court lacked authority to impose in the first place.

Indeed, that *Johnson* has no "procedural component" makes this case easier than this Court's recent decision in *Montgomery*. 2016 WL 280758, at

*14. There, the Court concluded that the rule of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), was substantive and retroactive notwithstanding the fact that *Miller* included certain procedural requirements which, if satisfied, would allow some juvenile offenders to be punished with life without parole. *Johnson* presents no such complexity: In all cases, a court is and was without authority to increase a defendant's sentence based on the residual clause. Because the residual clause increased a defendant's sentence from a *maximum* of 10 years' imprisonment to a *minimum* of 15 years' imprisonment, every person whose qualification under ACCA depended on the residual clause faces *at least* five additional years of confinement that were not authorized by law.[7]

In light of the above, it should be unsurprising that the prevailing (and arguably unanimous) view among the circuits that have considered the issue is that *Johnson* announced a substantive rule and thus applies

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[7] The record in this case is illustrative. Following Petitioner's initial plea to violating § 922(g)(1), absent enhancement, the court instructed Petitioner that sentencing him to more than 10 years' imprisonment would be "more than the law permits" and would amount to "an illegal sentence." Transcript of Plea Colloquy 19, *United States v. Welch*, No. 09-cr-60212 (S.D. Fla. June 18, 2010), ECF No. 54. Only by applying the residual clause to Petitioner's prior convictions for Florida robbery could he be sentenced to 15 years. JA 117a-119a. However, because ACCA's residual clause was in fact "void" and "as no law," *Montgomery*, 2016 WL 280758, at *10 (quoting *Ex parte Siebold*, 100 U.S. 371, 376 (1880)), the court's original instruction was correct: The 15-year sentence was indeed "illegal."

retroactively to cases on collateral review.[8] The circuits have also been unanimous in concluding that this Court's pre-*Johnson* decisions narrowing ACCA, *Begay v. United States*, 553 U.S. 137 (2008) (holding that driving under the influence is not a "violent felony" under ACCA),[9] and *Chambers v. United States*, 555

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[8] *See In re Rivero*, 797 F.3d 986, 989 (11th Cir. 2015) ("The new rule announced in *Johnson* is substantive rather than procedural because it narrowed the scope of section 924(e) by interpreting its terms, specifically, the term violent felony" (brackets omitted)); *In re Watkins*, No. 15-5038, __ F.3d __, 2015 WL 9241176, at *6 (6th Cir. Dec. 17, 2015) ("*Johnson* announced a substantive rule that prohibits the imposition of ACCA's 15-year mandatory minimum sentencing provision on defendants whose status as armed career criminals depends on application of the unconstitutionally vague residual clause"); *Price v. United States*, 795 F.3d 731, 734 (7th Cir. 2015) ("*Johnson*, we conclude, announced a new substantive rule."). Although the Fifth Circuit's reasoning in *In re Williams*, 806 F.3d 325, 325-26 (5th Cir. 2015), could be read to suggest that *Johnson* is not substantive, the court's analysis took place under the more circumscribed inquiry of whether *Johnson* has already been "made retroactive" by this Court, under 28 U.S.C. § 2255(h)(2). The court stated that it was aligning with the "decision and reasoning" of *Rivero*, in which the Eleventh Circuit concluded that *Johnson* is substantive and retroactive on collateral review, but that it has not yet been "made retroactive" by this Court. *Williams*, 806 F.3d at 326; *Rivero*, 797 F.3d at 989.

[9] *See Welch (Devin) v. United States*, 604 F.3d 408, 415 (7th Cir. 2010) (*Begay* is substantive and retroactive because it "narrowed substantially [the petitioner's] exposure to a sentence of imprisonment" and "hardly resembles a procedural device"); *United States v. Doe*, No. 13-4274, __ F.3d __, 2015 WL 8287858, at *15 n.13 (3d Cir. Dec. 9, 2015); *Jones v. United States*, 689 F.3d 621, 624-26 (6th Cir. 2012); *Sun Bear v. United States*, 644 F.3d 700, 703 (8th Cir. 2011); *Bryant v. Warden*, 738 F.3d 1253, 1276 (11th Cir. 2013).

U.S. 122 (2009) (holding that failure to report is not a "violent felony" under ACCA),[10] are substantive rules that must be applied retroactively. *See* Leah M. Litman, *Resentencing in the Shadow of* Johnson v. United States, 28 Fed. Sent'g Rep. 45, 47 (2015) ("It is hard to see how a decision 'interpreting' ACCA's scope would be substantive, but a decision invalidating ACCA's residual clause—which also alters ACCA's scope—would not be.").

2. The rule articulated in *Johnson* is substantive and retroactive notwithstanding that it does not forever prohibit Congress from imposing a particular punishment and that Congress could hypothetically amend ACCA to articulate a valid sentencing enhancement in lieu of the residual clause. *But see In re Williams*, 806 F.3d 322, 325-26 (5th Cir. 2015) (suggesting, in the context of a successive motion under § 2255, that for these reasons *Johnson* does not fall within an "exception to *Teague*"). To limit the category of substantive rules in that manner would be inconsistent with this Court's longstanding precedent and would make little sense as a matter of principle.

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[10] *United States v. Shipp*, 589 F.3d 1084, 1089, 1091 (10th Cir. 2009) (*Chambers* is a "substantive rule of statutory interpretation" because a defendant who "does not constitute an 'armed career criminal'" after *Chambers* has "received 'a punishment that the law cannot impose upon him.'"); *Narvaez v. United States*, 674 F.3d 621, 629 (7th Cir. 2011) (same); *McCarthan v. Warden*, No. 12-14989, __ F.3d __, 2016 WL 234356, at *5 (11th Cir. Jan. 20, 2016) (same); *see also United States v. Powell*, 691 F.3d 554, 563 (4th Cir. 2012) (adopting *Shipp*).

First, to except such rules from retroactivity would contravene this Court's recognition that "*Teague* continued a long tradition of giving retroactive effect to constitutional rights that go beyond procedural guarantees." *Montgomery*, 2016 WL 280758, at *9. Regardless of whether Congress could amend ACCA in the future, there is no reasonable way to characterize *Johnson* as a procedural rule that "regulate[s] only the *manner of determining* [a] defendant's culpability." *Schriro*, 542 U.S. at 353 (emphasis in original).

Second, although rules that immunize particular conduct from punishment or categorically prohibit particular penalties are certainly substantive, *see, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989) (rule categorically prohibiting capital punishment for intellectually disabled persons would be substantive), the Court has never limited the category of substantive rules in that manner. To the contrary, as described above, this Court has recognized that any rule that "alters the range of conduct or the class of persons that the law punishes" is substantive, including, for instance, "decisions that narrow the scope of a criminal statute by interpreting its terms." *Schriro*, 542 U.S. at 351-52, 353. As the Court has recognized, this follows directly from the principles underlying *Teague* and subsequent cases: "[D]ecisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, *like decisions placing conduct beyond the power of the criminal law-making authority to proscribe*," share the hallmark of substantive rules: They "necessarily carry a significant risk that a defendant stands convicted of an act that the law does

not make criminal." *Bousley*, 523 U.S. at 620 (quotation marks omitted) (emphasis added).

Bousley is instructive. There, the Court held that its interpretation of 18 U.S.C. § 924(c)(1) to require "active employment of a firearm" was not subject to *Teague*—even though that statutory interpretation did not permanently deprive Congress of the power to criminalize mere possession of a firearm in relation to a drug crime. The Court did not deem relevant the fact that Congress could later pass a law proscribing such possession (which Congress later did). *See United States v. O'Brien*, 560 U.S. 218, 232 (2010) (describing the amendments to § 924 that were made in "direct response to this Court's decision in *Bailey*"); *see also Goguen*, 415 U.S. at 581-82 (granting habeas corpus on the basis that the petitioner's statute of conviction was unconstitutionally vague, even though "nothing prevents a legislature from defining with substantial specificity" the conduct it intended to criminalize); *infra* Part I.C (discussing numerous cases in which this Court has allowed claims for habeas corpus in the absence of a permanent deprivation of the power to proscribe the underlying conduct or impose a given punishment).[11]

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[11] It would be wrong to distinguish *Bousley* from *Johnson* on the basis that *Bousley* "'explain[ed] what [the statute] has meant ever since [it] was enacted.'" *Williams*, 806 F.3d at 326. Holding that a statute is unconstitutionally vague—no less than interpreting it—is a conclusion as to the valid scope of the statute at the time it was enacted. *See Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it is, in legal contemplation, as inoperative as though it had never been passed."); *Ex parte*

The result in *Bousley* (and in the numerous cases throughout history discussed below) makes sense, because the hypothetical possibility that Congress might amend a statute to punish certain conduct in the future has no bearing on the lawfulness of confinement imposed *in the past* under the statute. Any future amendment to ACCA would not—and, under the Ex Post Facto Clause, *could* not—affect persons who were sentenced under the residual clause prior to *Johnson*. *See Peugh v. United States*, 133 S. Ct. 2072, 2077-78 (2013) ("The Constitution forbids the passage of ex post facto laws, a category that includes '[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" (quoting *Calder v. Bull*, 3 Dall. 386, 390 (1798)).

Thus, that *Johnson*'s invalidation of the residual clause did not make certain conduct or persons altogether immune from future punishment is beside the point. *Johnson* articulated a substantive rule and, as such, applies retroactively.

Siebold, 100 U.S. 371, 376-77 (1880) ("An unconstitutional law is void, and is as no law. An offence created by it is not a crime."). It would be irrational to give retroactive effect to a decision that narrows the scope of a federal statute based on statutory interpretation, but not to a decision that does so based on rights enshrined by the Constitution. Litman, *supra*, 28 Fed. Sent'g Rep. at 47.

C. The Origin Of *Teague* And The History Of Habeas Corpus Confirm That *Johnson* Is Substantive And Retroactive.

As this Court has explained, "the category of substantive rules" adopted by this Court "originated in Justice Harlan's approach to retroactivity" in *Mackey v. United States*, 401 U.S. 667 (1971), and *Desist v. United States*, 394 U.S. 244 (1969). *Montgomery*, 2016 WL 280758, at *8; *see Teague*, 489 U.S. at 292, 312. That approach recognized and incorporated the Court's long line of cases holding that habeas corpus is available to a prisoner, like Petitioner, who challenges the constitutionality of the statute that purported to authorize his or her punishment. Although "[t]his Court has not always followed an unwavering line in its conclusions as to the availability of the Great Writ," *Teague*, 489 U.S. at 308 (quotation marks omitted), that proposition has remained a fixed point since at least the nineteenth century.

Justice Harlan thus emphasized in *Mackey* and *Desist* that "'[t]he writ has historically been available for attacking convictions on [substantive] grounds.'" *Montgomery*, 2016 WL 280758, at *9 (quoting *Mackey*, 401 U.S. at 692-93) (second alteration in original). As he explained, such grounds included a variety of claims through which "the petitioner attacked the constitutionality of the federal or state statute under which he had been convicted," *Mackey*, 401 U.S. at 684 (citations omitted), including by arguing that certain "conduct [was] beyond the power of the criminal law-making authority to proscribe," *id.* at 692; *see also Desist*, 394 U.S. at 261 & n.2 (Harlan, J., dissenting)

(explaining that federal courts have always entertained habeas claims in which "the habeas petitioner attacked the constitutionality of the state statute under which he had been convicted"). As Justice Harlan observed—consistent with the principles this Court articulated in *Teague* and subsequent decisions—"[s]ince, in this situation, the State had no power to proscribe the conduct for which the petitioner was imprisoned, it could not constitutionally insist that he remain in jail." *Desist*, 394 U.S. at 261 n.2 (citing *Ex parte Siebold*, 100 U.S. 371 (1880)); *Montgomery*, 2016 WL 280758, at *9.

Justice Harlan identified a variety of constitutional challenges to the statute authorizing the defendant's conviction or punishment (or the manner in which the government enforced that statute) as representative of this class of cases in which habeas relief had traditionally been available, and in which retroactive application would remain appropriate under his proposed approach. *See Mackey*, 401 U.S. at 693 nn.7-8; *Desist*, 394 U.S. at 261 n.2. These included *Ex parte Siebold*, 100 U.S. 371 (1880), *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Crowley v. Christensen*, 137 U.S. 86 (1890). *Mackey*, 401 U.S. at 693 n.8; *see Desist*, 394 U.S. at 261 & n.2; *see also Fay v. Noia*, 372 U.S. 391, 451 (1963) (Harlan, J., dissenting) (citing *Ex parte Lange*, 85 U.S. 163 (1873), as another example of the traditional scope of habeas). As Justice Harlan observed, these historical cases allowed such claims on collateral review without regard to whether the constitutional rule invoked had been recognized at the time of the petitioner's conviction because claims challenging the court's authority to impose punishment

were always understood to fall within "the scope and purposes of the habeas corpus writ." *Mackey*, 401 U.S. at 684. The paradigms selected by Justice Harlan confirm that under his approach—as, indeed, under any other approach that this Court has ever employed—rules like the one announced in *Johnson* apply retroactively to final convictions on collateral review.

In *Siebold*, the Court held that the petitioners' claim that they were convicted pursuant to an unconstitutional statute was cognizable on habeas corpus and thus resolved the merits of their claim. The Court reasoned that a showing that one was convicted pursuant to an unconstitutional law provides a basis for collateral attack because it "affects the foundation of the whole proceedings." 100 U.S. at 376. It explained: "An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." *Id.* at 376-77. Accordingly, if the statute of conviction was later held unconstitutional, it followed that the trial court lacked "jurisdiction" and "authority" to punish the prisoner as it did, and habeas relief was warranted. *Id.*; *see also Montgomery*, 2016 WL 280758, at *9-10.

In *Yick Wo*, the petitioner sought habeas relief on the basis that his conviction for operating a laundry arose from a discriminatory application of a city ordinance, in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court agreed that the ordinance had been administered "with an evil eye and an unequal hand" in violation of the Fourteenth Amendment, and accordingly granted the petitioner

habeas relief from his final conviction. 118 U.S. at 373-74. That is, once again, the constitutional defect invalidated the conviction itself and therefore rendered habeas relief appropriate. *See also Crowley*, 137 U.S. at 92 (allowing and considering the merits of petitioner's habeas claim that his conviction was unconstitutional because it resulted from "the delegation of arbitrary discretion to the police commissioners exercised to deprive the petitioner of the equal protection of the laws").

Justice Harlan also invoked several other cases in which petitioners had challenged on habeas the constitutionality of the statute that authorized their punishment. *See Mackey*, 401 U.S. at 692 n.8 (citing "cases collected in" Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 384 n.30 (1964)). In *In re Gregory*, 219 U.S. 210 (1911), for instance, this Court held that a petitioner's claim that he had been denied due process under the Fifth Amendment because he had been convicted under a statute with "words so uncertain as to make the prohibition nugatory" was cognizable on habeas corpus, and therefore resolved the petitioner's claim on the merits. *Id.* at 214. Likewise, in *Ex parte Yarbrough*, 110 U.S. 651 (1884), the Court entertained the petitioner's challenge to the constitutionality of the statute under which he was punished and explained: "If the law which defines the offense and prescribes its punishment is void, the court was without jurisdiction, and the prisoners must be discharged." *Id.* at 654.

Justice Harlan drew these paradigms from a rich historical tradition. Indeed, this Court has repeatedly

granted habeas corpus on the basis of the same fundamental defect at issue here: that the petitioner's punishment was imposed without the authority conferred by a valid statute. In *In re Bonner*, 151 U.S. 242 (1894), for instance, the Court granted habeas relief to a federal prisoner who had been sentenced to imprisonment in a state penitentiary in the absence of a federal statute authorizing that form of punishment. The Court explained that in "either stage" of a criminal proceeding, a court "must keep strictly within the limits of the law authorizing it to take jurisdiction." *Id.* at 256. For example, "[i]f the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess." *Id.* at 258; *see also In re Mills*, 135 U.S. 263, 269-71 (1890) (same); *Ex parte Lange*, 85 U.S. 163, 164, 175-78 (1873) (granting habeas relief to a prisoner who was subjected to both of two alternative punishments listed in the statute of conviction, on the ground that this violated the Double Jeopardy Clause); *In re Medley*, 134 U.S. 160, 161-62, 166-74 (1890) (granting habeas relief to a prisoner who had been sentenced to solitary confinement, because application of the statute authorizing that punishment violated the Ex Post Facto Clause); *see also Bozza v. United States*, 330 U.S. 160, 166 (1947) ("It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal or in habeas corpus proceedings." (citing *In re Bonner*, 151 U.S. 242)).[12]

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[12] Following its decision to limit the retroactivity of certain procedural rules in *Linkletter v. Walker*, 381 U.S. 618, 622 (1965),

These challenges to a court's authority to impose the punishment that it ordered "represent[] the clearest instance where finality interests should yield." *Mackey*, 401 U.S. at 693 (opinion of Harlan, J.). Indeed, to describe the "finality implications such [cases] present," *id.* at 693 n.8, Justice Harlan referred readers to a passage explaining that "the Supreme Court has consistently entertained federal prisoners' collateral challenges to the 'face' constitutionality of the underlying criminal statute" because "[a] claim that the movant pleaded guilty to a crime under a statute unconstitutional 'on its face' offends none of the finality elements significantly." Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 384 & n.30 (1964); *see also Montgomery*, 2016 WL 280758, at *11 ("the retroactive

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the Court continued to "recognize[] full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place." *United States v. Johnson (Raymond)*, 457 U.S. 537, 550 (1982). It thus hewed to the longstanding principle that a criminal judgment in excess of a court's valid authority is "void *ab initio*." *Id.*; *see, e.g.*, *Goguen*, 415 U.S. 566 (granting habeas relief on the basis that the statute of conviction was unconstitutionally vague); *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970) (explaining that the Court "d[id] not hesitate" to hold that the petitioner was entitled to habeas relief based on a new rule incorporating the Double Jeopardy Clause against the states); *Robinson v. Neil*, 409 U.S. 505, 506 (1973) (holding that the Double Jeopardy Clause's prohibition on dual prosecution by a state and one of its municipalities applies retroactively); *Davis v. United States*, 417 U.S. 333, 346 (1974) (holding that a claim based on an intervening change in statutory interpretation is cognizable on habeas corpus because it alleges that the claimant's "conviction and punishment are for an act that the law does not make criminal").

application of substantive rules does not implicate a State's weighty interests in ensuring the finality of convictions and sentences").

In light of the above, it cannot be doubted that *Johnson* is substantive and applies retroactively. *Johnson* held the residual clause void on its face and unconstitutional in all of its applications. Petitioner's claim—that he was subject to punishment based on that facially invalid statute—has throughout history been a paradigmatic basis for habeas corpus and, like the many cases above, represents "the clearest instance where finality interests should yield." *Mackey*, 401 U.S. at 693.

Moreover, the cases above belie any suggestion that substantive rules are limited to those that forever "deprive[] the State of the power to impose a certain penalty." *Williams*, 806 F.3d at 325-26. In *Gregory*, for instance, the petitioner's claim was allowed on habeas corpus not because he alleged that the operation of a "business of issuing and redeeming so-called 'trading stamps'" was immune from regulation, but because he alleged that the statute of conviction was so vague that it violated the Fifth Amendment. 219 U.S. at 213-15. In *Yick Wo*, the Court granted habeas relief not because the operation of a laundry is constitutionally immune from regulation, but because the application of the ordinance to the petitioners violated equal protection. 118 U.S. at 373-74. And in *Lange*, the Court granted habeas relief not because Congress lacked the power to impose a sentence of one year of imprisonment for stealing a Post Office mailbag, but

because application of the statute to the petitioner violated the Double Jeopardy Clause. 85 U.S. at 176.

II. Because *Johnson* Is Retroactive, The District Court's Judgment Is In Error And The Eleventh Circuit's Denial Of A Certificate Of Appealability Must Be Reversed.

Petitioner is entitled to a certificate of appealability upon making "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). Such a showing has been made when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Petitioner is entitled to a certificate of appealability because he has shown not only that "reasonable jurists could debate" his entitlement to relief, but that any reasonable jurist would agree with it. First, for the reasons stated above, *Johnson* is plainly a substantive rule that must be applied retroactively to Petitioner.

Second, any reasonable jurist would agree that *Johnson* entitles Petitioner to resentencing. To begin with, in his petition to this Court, Petitioner specifically argued that his predicate convictions for Florida robbery (which were essential to his qualification under ACCA) could qualify only by virtue of ACCA's residual clause, Pet. at 5, and the government did not contest

that point. *See* Sup. Ct. R. 15 (objections not raised in certiorari briefing are "deemed waived").[13]

Moreover, the record is clear that, at a minimum, "reasonable jurists could debate" whether Petitioner qualifies under any of ACCA's other clauses: On direct appeal, the Eleventh Circuit analyzed whether Petitioner's Florida robbery predicates could qualify under ACCA's elements clause (the only possible alternative to the residual clause) and concluded that it "arguably would not apply." JA 117a.

In fact, it is clear that Florida robbery does not qualify under the elements clause. In *Johnson (Curtis) v. United States*, 559 U.S. 133, 140 (2010) ("*Curtis Johnson*"), this Court held that Florida battery did not qualify under the elements clause because it did not require as an element the use or threat of "*violent* force," defined as "'extreme physical force'" that is "capable of causing physical pain or injury to another person." *Id.* at 140-41 (quoting *Black's Law Dictionary* 1188 (9th ed. 2009)) (emphasis in original). The same is true of Petitioner's convictions for Florida robbery, which could be committed by taking the property of another with the "use of force, violence, assault, or putting in fear." Fla. Stat. § 812.13 (1) (1992). As the Eleventh Circuit found and the government conceded at sentencing, at the time of Petitioner's convictions, robbery by "use of force" could be committed with

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[13] The government also did not raise, and has thus waived, any procedural objections to this Court's consideration of the questions presented, including procedural default or failure to preserve. Sup. Ct. R. 15.

"'any degree of force,'" no matter how minimal. JA 113a-115a (quoting *McCloud v. State*, 335 So. 2d 257, 258-59 (Fla. 1976)); JA 152a (government conceding that Florida robbery "doesn't have a requirement" as to "the degree of force involved"). Indeed, robbery could be committed by "putting in fear" where the defendant has not used or threatened *any* physical force against the victim's person, *see, e.g.*, *State v. Hawkins*, 790 So. 2d 492, 496 (Fla. 4th Dist. Ct. App. 2001) (requiring only that "the circumstances attendant to a robbery are such as to induce fear in the mind of a reasonable person"), including, for instance, where the defendant has threatened to accuse the victim of sodomy in an attempt to destroy the victim's reputation, *Montsdoca v. State*, 93 So. 157, 162 (Fla. 1922). Because *Curtis Johnson* held that an offense must have violent force as an element, and petitioner's Florida robbery conviction plainly did not, *Curtis Johnson* directly controls and the enhancement cannot stand under the elements clause. Petitioner's qualification under ACCA was thus contingent on the now-void residual clause.

Because any reasonable jurist would conclude that Petitioner is entitled to be resentenced under *Johnson*—or, at a minimum, reasonable jurists could debate his entitlement—the Eleventh Circuit's denial of a certificate of appealability should be reversed. *See Bigelow v. Virginia*, 421 U.S. 809, 827 (1975) (where the outcome of the issue before the Court "is readily apparent," reversal is the appropriate remedy).

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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